time" to build roads and mills and to cut, manufacture, and remove trees, and providing that grantee shall have 10 years in which to cut and remove the trees, and that grantor shall have the right to deaden the trees standing on expiration of such 10-year period and clear the land for cultivation, held to convey fee in standing timber with indefinite time for removal even after expiration of 10-year period.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 420.]

7. Logs and Logging (§ 3 (5)*)—Evdence Held Not to Prove Abandonment.—In an action to enjoin removal of standing timber, evidence held not to prove abandonment of the right to the timber under timber deed.

Appeal from Circuit Court, Dickenson County.

Suit by William J. Branham and another against Wilson Bros. and another. Decree for complainants, and defendants appeal. Reversed.

A. A. Skeen, of Clintwood, *Phipps & Phipps,* of Clintwood, *O. M. Vicars,* of Wise, *J. W. Flannagan, Jr.,* of Grundy, and *Geo. C. Peery,* of Tazewell, for appellants.

Sale & Harris, of Richmond, and *Chase & McCoy,* of Clintwood, for appellees.

WILSON BROS. et al. *v.* W. M. RITTER LUMBER CO.

Sept. 28, 1921.

[109 S. E. 201.]

Appeal from Circuit Court, Dickenson County.

Suit by the W. M. Ritter Lumber Company against Wilson Bros. and others. Decree for complainants, and defendants appeal. Reversed.

A. A. Skeen and *Phipps & Phipps,* all of Clintwood, *O. M. Vicars,* of Wise, *J. W. Flannagan, Jr.,* of Grundy, and *Geo. C. Perry,* of Tazewell, for appellants.

Sale & Harris, of Richmond, and *Chase & McCoy,* of Clintwood, for appellees.

PENDLETON *v.* COMMONWEALTH.

Sept. 22, 1921.

[109 S. E. 201.]

1. Homicide (§§ 233, 245*)—Evidence Held Insufficient to Establish Motive Claimed or to Show Shooting Necessary to Accomplish Same.—In prosecution for murder, evidence held insufficient to show

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

that defendant's motive was to put an end to decedent's lewd purpose toward and persistent attentions to defendant's sister-in-law or that the shooting was necessary to accomplish that end.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 149.]

2. Homicide (§ 244 (1)*)—Evidence Held Insufficient to Show Self-Defense.—In prosecution for murder, evidence held insufficient to establish self-defense.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 151.]

3. Homicide (§ 214 (3), 221*)—Dying Declarations as to Facts Leading Up to Declarant's Death Admissible as Res Gestæ and Entitled to Same Weight as if under Oath.—Dying declarations to identify the prisoner or to show the facts leading up to, causing, or attending the act resulting in the declarant's death are admissible and have the same weight as if made under oath; such facts being the res gestæ within the doctrine of dying declarations.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 922.]

4. Homicide (§ 214 (3)*)—Dying Declaration Admissible, if Admissible under Oath.—Any dying declaration which would be admissible had declarant been sworn as a witness is admissible if confined to the facts leading up to, causing, or attending the homicide.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 849.]

5. Homicide (§ 215 (1, 4)*)—Dying Declaration, if Hearsay Opinion, or Irrelevant, Is Inadmissible.—A dying declaration, if hearsay, matter of opinion, or irrelevant, is inadmissible, but, if it relates to relevant facts within declarant's knowledge, it is admissible.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 849.]

6. Homicide (§ 214 (3)*)—Dying Declaration that Accused Borrowed Money from Deceased Shortly before Shooting Held Admissible to Show Animus.—In a prosecution for murder, deceased's dying declaration that defendant borrowed money from him a few hours before was admissible as showing their conduct toward each other shortly before and leading up to the shooting and defendant's animus toward declarant at the time thereof.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 847.]

7. Criminal Law (§ 338 (3)*)—Admission of Dying Declaration Held Not Error Where Accused Testified as to Subject Thereof and Commonwealth Introduced Rebuttal Testimony.—In a prosecution for murder, admission of a dying declaration that defendant borrowed money from decedent shortly before the shooting was not reversible error where defendant himself testified on such subject, and the commonwealth without objection introduced rebuttal testimony.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 593.]

8. Homicide (§ 214 (3)*)—Dying Declaration Merely as to State of Feeling between Declarant and Accused Inadmissible.—Statements in a dying declaration consisting merely of the state of feeling between declarant and accused are inadmissible, though material and relevant,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

since the accused must be tried for his deeds in the light of the situation as it reasonably appeared to him from the outward demeanor and conduct of the deceased, and not in the light of his secret state of feeling toward accused.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 849.]

9. Homicide (§ 214 (3)*)—Dying Declaration that Decedent Had Done Nothing to Accused or Any One Held Admissible.—In a prosecution for murder, dying declarations of deceased that he was doing nothing at the time and had done nothing to accused or anybody to give him any cause to shoot were admissible, being declarations, not of a mere state of feeling between the parties, but of outward conduct of declarant toward accused and others.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 847.]

10. Homicide (§ 214 (3)*)—Dying Declaration as to Facts Leading Up to, as Well as Those Occurring at Time, Held Admissible.—Though a general statement in a dying declaration that there was no cause for accused's act is not admissible, dying declarations as to facts leading up to a homicide, as well as to those occurring at the very time, which have a natural bearing on the motives and probable conduct of accused at such time, are admissible.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 923.]

11. Homicide (§ 215 (4)*)—Dying Declarations of Conclusions of Fact Admissible.—Though the opportunity for cross-examination furnishes a safeguard against untrue general statements of conclusions of fact which is absent in the case of dying declarations, the same consideration of necessity which excepts dying declarations from the rule against hearsay evidence operates in favor of admitting such declarations of conclusions of fact, as well as of specific facts.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 923.]

12. Homicide (§ 221*)—Dying Declarations Admissible for What They Are Worth in Light of Other Evidence.—Dying declarations are not admitted as evidence which is true, but only for what the jury may consider them worth in the light of all the other evidence and circumstances.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 850.]

13. Homicide (§§ 214 (3), 215 (4)*)—Dying Declaration as to Conclusion of Fact Must Refer to Relevant Facts So Nearly Antecedent to Time of Homicide as to Show Motive and Probable Conduct of Accused at Such Time.—A dying declaration is not inadmissible merely because it states a conclusion of fact, but must refer to relevant facts which, if they do not attend the very time of the homicide or concern the cause of death, are so nearly antecedent in time as that it may be reasonably considered they tend to show motive and probable conduct of accused at such time.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 849.]

14. Homicide (§ 214 (2)*)—"Circumstances of the Transaction It-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

self" Not Confined to Occurrences at Very Time of Homicide.—"Circumstances of the transaction itself," as used in the doctrine of dying declarations, are the circumstances or facts leading up to, causing, or attending the homicide, and are not confined to occurrences at the very time thereof.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 144.]

15. Homicide (§ 221*)—Absence of Self-Serving Purpose Not Essential to Truthworthiness of Dying Declarations.—The absence of any self-serving purpose is not an essential element of the circumstantial guarantee of the trustworthiness of dying declarations.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 848.]

16. Homicide (§ 214 (3)*)—Dying Declarations as to Decedent's Relations with Accused's Sister-in-Law Held Admissible Where Such Relations Existed for Only Few Weeks Prior to Homicide.—In a prosecution for murder, decedent's dying declarations as to his relations with defendant's sister-in-law, on account of which defendant claimed to have shot, were admissible where such relations had existed only a few weeks prior to the homicide, and the commonwealth, without objection, introduced testimony concerning such relations during all of such time.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 141.]

17. Witnesses (§§ 246 (2), 282*)—No Error in Examining as Court Witness and Permitting Cross-Examination by Commonwealth of Hostile Witness Summoned by It, Though Adverse Interest Not Shown.—Under Code 1919, § 6214, permitting cross-examination of a party's own witness who has an adverse interest, the court did not err in a criminal case in introducing and examining as a court witness one summoned by the commonwealth who had not been sent before the grand jury because she stated she did not know anything and "had refused to talk to any one before the trial," nor, "the witness showing great reluctance to testify," in permitting the commonwealth to cross-examine her as a hostile witness and ask leading questions; the statute being applicable, though it is not shown the witness had an adverse interest, if she is in fact adverse.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 954.]

18. Criminal Law (§ 246 (2)*)—Court in Criminal Case May Call as Court Witness Adverse Witness Summoned by Commonwealth.—In a criminal case the court may, in the exercise of a sound discretion, call and examine as a court witness an adverse witness summoned by the commonwealth.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 71.]

19. Criminal Law (§ 244*)—No Error in Permitting Cross-Examination of Witness Who Proved Hostile on Direct Examination.—In a criminal case the court did not err, in view of Code 1919, § 6214, permitting cross-examination of a party's witness who has an adverse

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

interest, in permitting such examination by the commonwealth of a witness who on direct examination by it proved hostile.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 954.]

Appeal from Circuit Court, Buckingham County.

Wyatt Pendleton was convicted of murder in the second degree, and he appeals. Affirmed.

F. C. Moon and *J. B. Boatwright,* both of Buckingham, for appellant.

John R. Saunders, Atty. Gen., and *J. D. Hank, Jr.,* and *Leon M. Bazile, Asst. Attys. Gen.,* for the Commonwealth.

DEITZ *v.* WHYTE.

Sept. 22, 1921.

[109 S. E. 212.]

1. Attachment (§ 103*)—Affidavit Held Not to Show Decree on Which Execution Could Issue.—Statements in an affidavit for attachment under Code 1904, § 2961, referring to a decree as showing the amount due, held not to warrant a presumption that plaintiff had a personal decree against defendant on which execution could issue, and that therefore attachment would not lie.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 92.]

2. Appeal and Error (§ 1002*)—Verdict for Claimant in Attachment on Conflicting Evidence Conclusive.—Verdict for a claimant in attachment rendered on conflicting evidence will not be disturbed.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 605.]

3. Fraudulent Conveyances (§ 149 (2)*)—Recording Statute Inapplicable Where Possession Passes to Third Party before Plaintiff's Rights Attach.—Where defendant sold the property to a third party, who obtained possession before plaintiff's rights attached it was immaterial that the bill of sale was never recorded.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 586.]

4. Appeal and Error (§ 1058 (1)*)—Erroneous Exclusion of Evidence Harmless Where Subsequently Admitted.—Where evidence is erroneously excluded, but subsequently admitted, the error is harmless, no prejudice having resulted.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 584.]

5. Evidence (§§ 243 (1, 7)*)—Agent's Declarations Not During Agency Inadmissible against Principal.—The declarations of an agent made before the agency began or after its termination cannot be given in evidence against his principal.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 282.]

6. Evidence (§ 121 (3)*)—Claimant's Letter of Instruction to

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.